MAKE YOUR MEDIATION WORK

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Having retired from the trial bench 12 years ago, I have mediated over one thousand matters. My observations as to what is the most effective way a lawyer should approach the mediation process follows in this article.

Mediation of a dispute or lawsuit gives the parties an early opportunity to settle the issues, thereby saving everyone time and money. Almost all parties like a settled case– as opposed to a matter which goes to a judge, jury or arbitrator. The settlement is a binding contract and the parties can get on with their business and lives.

There are two goals in every mediation: getting the best possible deal for your client and effecting a legally binding agreement. Those two goals are interwoven. To get the best deal, the lawyer has to be knowledgeable as to the relevant facts and law and be prepared to present the client's position to both the mediator and the opposing side in the very best light. To reach an agreement, the client has to be conditioned to engage in good faith bargaining. This necessarily requires compromise. It also requires the client be ready, willing, and able to sign a written settlement agreement the very day of the mediation. Good lawyers achieve these goals by employing the following techniques.

Pre-mediation conference with client

No matter how strong your client's position, caution the client about the vagaries of the legal system: fickleness of the trier-of-fact, potential adverse judicial rulings, costs and delays associated with the legal process, no such thing as a "slam-dunk" , money now rather than later. Explain the mediation process and the patience needed during the protracted negotiations. Give your client a snapshot of the mediator (background, standing in the profession, prior experiences).

Briefs

Prepare a brief on the background, relevant facts (and the evidence proffered in support), and the application of the law to those facts. Deliver that brief to the mediator enough time before the scheduled session so the mediator has time to read and digest it. Send a copy to opposing counsel. Exchanging briefs is directly proportional to being able to settle the case. Prepare a second supplemental brief or letter for the mediator's eyes only. This second brief should address: what the real impediments/roadblocks are to settlement; client's needs/wants/expectations; your perception of what the other sides strengths or weaknesses are; financial conditions of both parties (if relevant); history of any negotiations between counsel/parties; frictions between parties/counsel; any secondary or underlying agendas not evident to an outsider; and any information you do not want the other side to know about. The mediator needs to know what has prevented an agreement to date. As the attorney, you have lived with this case long enough to have some insight to share with the mediator.

Pre-mediation session phone call with mediator

After you have furnished the mediator with briefs, and if the mediator has not called you, phone the mediator to introduce yourself and to discuss any logistics for the mediation. For example, if the chemistry between the parties is volatile, suggest that a joint session might be counter-productive. Or if one of the decision makers is going to be on telephone stand-by, suggest the mediator's venue have available speaker-phone, Skype, email, fax, and/or scanning capability for that person to be in real time participation with the process. Your call is a permissible ex-parte communication with the neutral because the very nature of the mediation process (which began with the engagement of the mediator's services) is a series of ex parte communications by counsel and parties with the neutral.

Presence of the party/decision maker

Cases don't settle unless the person calling the shots is present. Presence can be by telephone stand-by so long as the person connected by phone, speaker-phone, or other real time engagement in the process actually has the authority to settle the dispute. But if your client or necessary party (company representative, adjuster, beneficiary, general counsel) is not able to physically attend, you should let opposing counsel know that fact as soon as it is known to you. Opposing parties do not like to be surprised by the other party's non-attendance. It conveys the impression the non-attendee is not serious about resolving the dispute. A spouse, friend, or relative whose counsel and consent are vital to the client's decision to settle should also be present.

Prepare a Proposed Settlement Agreement

In advance of the mediation session, draft a template for settlement or at least a proposed terms sheet. If you have a lap-top computer, load the template onto a program which can later be printed out (with appropriate changes or additions) when the parties have reached an agreement. The terms sheet should include all material items your client is looking for such as mutual releases, C.C. 1542 waivers, confidentiality, non-admission of liability, enforceability under C.C.P. 664.6, and other non-economic considerations (e.g., distribution of personal property or a letter of apology). This pre-prepared terms sheet serves two purposes. It acts as a check list of items which must be addressed during negotiations. It also serves as the formal settlement agreement which can be executed by the parties the very day of the mediation. You won't have to scurry around post-mediation, exchanging drafts of a formal agreement and then getting the parties to execute a second formal agreement.

Client Control

From experience those cases which do not settle are those where the attorney has client control problems. You will know if you have this kind of client. You should let the mediator know of this situation as early as possible. An effective mediator may be able to exert some influence on the difficult client before the client takes over the negotiation process. Many times the client

does not realize what is in the client's best interest. That is why the client has an experienced attorney. The mediator can assist you in discharging your duties to your client without compromising neutrality.

Bargain Realistically

The purpose of mediation is to resolve disputes. Both sides come to the bargaining table with the expectation the other side really wants to settle. Oftentimes I liken this to the fly fisherman and the brown trout hunkered down at the tail of a pool in a stream. The fisherman is there to catch the trout; the trout is there to eat insects coming downstream in a foam line and at a place in the water column where the trout has to exert the least amount of energy for the size of the reward. If the fisherman throws a clouser (heavy fly) into the pool, or slaps the line over the water, or casts a shadow the fish can see, or – God forbid – steps into the water upstream, goodbye fish. The claimant needs to make offers that are designed to keep the respondent at the bargaining table. Likewise, the trout needs to eat. The respondent needs to have this claim resolved so that it can go on with life. It needs to make offers to settle which are commensurate with its liability and damages exposure.

Explain the Obligations Attendant to the Settlement

The client's duties, particularly those of the respondent, should be clear. When reading over the terms of the Settlement Agreement about to be signed, emphasize what subsequent steps the client has to perform. For example, the agreement may entail the client obtaining a loan, signing recordable documents to transfer title to property, or erecting a fence with the attendant permits, survey, and costs. Of course, you will document these obligations to your client in a subsequent letter, but that letter should contain no surprises – nothing you did not already explain at the conclusion of the mediation.

Contents of the Settlement Agreement

Use this guide: who, what, when, where, and how. Who makes the payment or performs the required task? What is the amount due or what is the performance required? When are the payments to be made or by what dates are the tasks to be accomplished? Where are the payments to be sent? How (in what manner) are the respondent's obligations to be carried out? If the settlement calls for the payment of money but no due date is expressed in the written agreement, your office will be called daily by your client inquiring, "Where's my money?" Enough said.

Good Luck. I trust these suggestions will be helpful in your next mediation.